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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 701

IN THE MATTER OF BUDDY LYNN WHITTINGTON
ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO,
FAIRFIELD COUNTY

BRIEF FOR THE RESPONDENT

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STATEMENT OF THE CASE

On July 29, 1966, and prior thereto, the deceased, Gladys Willard, her husband, Herman Willard, and their son, Jack Willard, lived at 220 Fremont Street in the Village of Baltimore, Ohio. Buddy Lynn Whittington, an alleged delinquent child, lived with his parents, O. A. Whittington and Ollie Mae Whittington, across the street from where the Willards lived. The Whittingtons had been close friends of the Willards and associated frequently, especially Mrs. Whittington and Mrs. Willard.

On the morning of July 29, Mrs. Willard and Mr. Willard had breakfast at approximately the hour of 5:45. Their breakfast consisted of corn flakes for Mr. Willard and a dry wheat cereal for Mrs. Willard. Mr. Willard then went to his work at the farm of Adam Poff. He was to be at work at 6:00 A.M., and he had only a mile or so to go to his work. Herman Willard remained at his work and did

not return home until sometime in the afternoon of the 29th and after he had been notified that his wife, Gladys Willard, was missing.

Jack Willard, who was then living with his mother and father at 220 Fremont Street, Baltimore, Ohio, was employed at the Defense Construction Supply Center, formerly called Columbus General Depot, in Columbus, Ohio, and he was required to be at work at 7:45 A.M. On the morning of July 29, he arose about 6:20, had a cup of coffee for breakfast, and left for work at approximately 6:50. When he left for work, his mother, Gladys Willard, was talking to her sister, Mrs. Anderson, on the phone. He arrived at his place of employment at approximately 7:45 and remained there all day until approximately 3:30 P.M., when he left to come home after he had been notified that his mother was missing.

Gladys Willard had made arrangements to pick up her sister, who lived with her mother on Route 204, at approximately 10:00 to 10:30 A.M., and go shopping with her in the City of Lancaster, Ohio.

At approximately 7:30 A.M., O. A. Whittington and Ollie Mae Whittington, father and mother of Buddy Lynn Whittington, had gone to Canton, Ohio, to spend the day with some relatives and had left their son, Buddy, at home, as he was going to school. At approximately 8:00 A.M., Buddy Whittington said that Mrs. Gladys Willard came to the back door of the Whittington home to return some hair curlers which Mrs. Whittington had used in setting Mrs. Willard's hair the previous evening. Mrs. Willard was never seen alive after this time.

When Mrs. Lula Willard, who lives at 226 Fremont Street, Baltimore, Ohio, and who was the daughter-in-law of Gladys and Herman Willard and who lived immediately north of Gladys and Herman Willard, went to the home of

Mrs. Willard at 20 minutes till 9:00 on the morning of July 29 to talk to Mrs. Willard about buying a pair of pajamas for her little girl when Mrs. Willard went shopping, she could not find Mrs. Willard at home at that time, but her car was parked in the driveway. At about 10:00 o'clock A.M., she again went to the home of Mrs. Willard; and she was not there. At about 11:45 she sent her daughter over to see if Mrs. Willard was home, and she was not there at that time although the car was still in the driveway.

At approximately 20 after 12:00 to 12:30 P.M., on said date, Mrs. Aurallia Goodrich, sister of Mrs. Willard, came to the home of Mrs. Willard looking for her, as she had been unable to contact her by phone. She searched through the house and, being unable to find Mrs. Willard, went across the street to the Whittington residence to inquire as to her whereabouts. Buddy Lynn Whitttington came to the door and told Mrs. Goodrich that Mrs. Willard had been over there that morning and brought some curlers back. Mrs. Goodrich asked Buddy where Mrs. Willard usually went berry picking, and Buddy told her that Mrs. Willard usually went berry picking with Mrs. Estep and showed Mrs. Goodrich where Mrs. Estep lived. Mrs. Goodrich, her husband, and Mrs. Estep searched for Mrs. Willard in the fields, Buddy Lynn Whittington later joining in the search, where Mrs. Willard usually picked blackberries, all of that afternoon. They were later joined by Elwood Phillips, Chief of Police of Baltimore, other relatives of Mrs. Willard, Boy Scouts, and others who searched for Mrs. Willard until dusk.

Mr. O. A. Whittington and his wife returned home at approximately 7:30 on the same evening and at that time learned that Mrs. Willard was missing. When he returned home, he could not find the key to his house as it was not in the place where it was usually kept he went to the school

house where Buddy was playing baseball, and Buddy came home with him, got the key and went in the house with his parents. A short time after this, Mr. Whittington went back into his home and searched his house and garage for Mrs. Willard and failed to find her. A few minutes after this, he realized that he had not looked under the beds in his home; so he went back in the house and when he looked under the bed of Buddy Lynn Whittington, he found the body of Mrs. Willard under the bed. The body of Mrs. Willard was not visible unless a person bent over sufficiently to see under the bed. After finding the body of Mrs. Willard, the police and sheriff's office were notified. The coroner came, examined the body and ordered the body into University Hospital for autopsy. Investigation disclosed that Mrs. Willard had gone to the Whittington home and talked to Buddy Lynn Whittington at approximately 8:00 o'clock that morning, that she had not been seen since that time until her dead body was found. That on that date, Buddy Lynn Whittington did not go to school, giving the reason that he had an upset stomach disorder of some kind and that he had not left the house after his mother and father had left at approximately 7:30 until about 30 minutes after Mrs. Goodrich had come to the Whittington home to inquire about her sister, Mrs. Willard, at approximately 12:30 P.M.

The coroner testified that he examined the body of Mrs. Willard at approximately 8:45 P.M., and that the woman had been dead approximately 12 hours prior to that time, but over 11 hours, and that she had remained in the position where the body was found for that number of hours, that the cause of death was homicide by strangulation.

Dr. Cuppage testified that he performed the autopsy on the body of Mrs. Willard and that the cause of death was asphyxiation due to strangulation. That there was hemorrhage, hematoma within the soft connective tissues of the neck; fractures of the hyoid bone, hyperema and dilation

of the blood vessels in the upper portions of the trachea and the esophagus; hemorrhage in the scalp, below the scalp, and in the scalp overlying the skull. That Mrs. Willard had suffered fractures of the right third, fourth and fifth ribs and left sixth rib. Dr. Cuppage testified that examination of the contents of the stomach disclosed about 50 cc's of partially digested food and that this consisted of almost completely digested vegetable fibers and that this food had been eaten from one and one-half to three hours prior to the time of death.

When the body of Mrs. Willard was found on the evening of July 29, 1966, she was on her back with her head toward the foot of the bed. Her dress was pulled up around her waist and her panties and the garter-belt had been pulled down. Her eye glasses, lower set of teeth, her hair net and shoes were close to the body. The room in which she was found was approximately 8′ by 11′ and the body could not be seen unless one bent over so that they could see under the bed. She was under that portion of the bed nearest to the north window in the room and on the opposite side from the doorway to the room. The coroner testified that he examined the body of Mrs. Willard at approximately a quarter till nine p.m. on July 29, 1966, and that at that time, he found that most of the body heat had been lost from the body. The arms were cold, and the torso still had some heat but there had been considerable loss of heat. Post-mortem rigidity was complete. Post-mortem lividity was quite marked. That he estimated, based upon examination of the body that she had been dead approximately twelve hours. The coroner further testified that she had been in the same position, on her back approximately twelve hours and that the cause of death was homicide by strangulation.

On the evening of the 29th day of July, after the body of Gladys Willard had been removed from the Whittington home, Buddy Lynn Whittington, as well as his parents, and

in the presence of his parents and one other person believed to be a relative, was talked to by the Juvenile Probation Officer, Dan Berry, Deputy Sheriff and the Prosecuting Attorney. Buddy was not under arrest, and was not taken into custody and was left with his parents. He and his parents were questioned but a very short period of time and neither was accused of having committed this crime. During the same evening, the other members of the Willard family were questioned by the officials as well as some of the other neighbors. The investigation was not limited to the Whittington family and no one was taken into custody on that date.

On August 5th, 1966, a complaint was filed by Elwood R. Phillips, Chief of Police of the Village of Baltimore, Ohio, alleging that Buddy Lynn Whittington was a delinquent person in that he did on the 29th day of July, 1966, unlawfully, purposely and maliciously kill one Gladys Willard, and a warrant was issued for his arrest and on the same date, Buddy Lynn Whittington was arrested and taken into custody. This was 7 days after the date that Mrs. Willard was killed.

On the same date, August 5th, 1966, an Entry was filed in said Court showing the defendant to be represented by Attorney Jack Supman and Attorney Judson Kistler. The Journal of the Court also shows that said child was brought before the Court on the same day, August 5th, 1966, and, on motion of counsel for Buddy, the arraignment of him was continued until August 11th, 1966.

On August 10th, 1966, counsel for Buddy Lynn Whittington filed a Motion to have him released to the custody of his parents or for the Court to fix bond for the defendant.

On August 10th, 1966, counsel for Buddy Lynn Whittington filed a Motion to dismiss the complaint on the ground that he was improperly arrested.

On August 10th, 1966, counsel for Buddy Lynn Whittington filed a Motion to dismiss the complaint on the ground that the entire Juvenile Court Act is unconstitutional.

On August 11th, 1966, defendant was arraigned and entered a plea of "not guilty," and said cause was set for hearing on August 24th, 1966.

On August 12th, counsel for defendant filed a motion to suppress any evidence of statements made by the defendant when he was interrogated by law enforcement officers and representatives.

On August 24th, 1966, counsel for defendant filed a motion for the court to fix bond or that the defendant be immediately released to the custody of his parents.

The motion to have Buddy Lynn Whittington released to the custody of his parents, which was filed August 10th, 1966, was heard August 11th, 1966, and, was overruled by the Court in an Entry filed August 25th, 1966. On the same day, August 11th, 1966, the Court heard the motion to dismiss the complaint and the same was overruled by Entry filed August 25th, 1966. On August 11th, 1966, the motion to dismiss based upon the contention that the Juvenile Code was unconstitutional, was heard and overruled by Entry filed August 25th, 1966.

On August 25th, 1966, the Court heard another motion filed by counsel for Buddy Lynn Whittington, for the Court to fix a reasonable amount of bond or release Buddy to his parents and the Court by Entry dated September 1st, 1966, denied said motion.

By Entry dated September 1st, 1966, the Court continued the cause on the ground that essential witnesses were out of the jurisdiction of the Court and could not be present for the August 24th trial date, and continued the cause until September 2nd, 1966.

On September 2nd, 1966, counsel filed another motion to dismiss the proceedings for the reason that the Juvenile

Court provisions of Ohio were unconstitutional. This motion was heard on the same day and overruled by the Court by Entry dated September 7th., 1966.

On September 2nd, 1966, counsel for Buddy Lynn Whittington filed a motion to dismiss the complaint and entire proceedings for seven various reasons, which said motion was heard and overruled on the same day by an Entry dated September 7th, 1966. Also on the same day, September 2nd., 1966, the Court heard the motion of the defendant to suppress evidence of statements made by the defendant and overruled the same in an Entry filed September 7th., 1966.

On September 7th, 1966, counsel for the defendant requested the Court for leave to have the parents take Buddy Lynn Whittington to attend a funeral for the defendant's grand-father, which said application was granted by the Court in an Entry dated September 7th., 1966.

On September 2nd, 1966, this cause came to be heard on its merits and the Court heard all of the evidence offered by the prosecution, no evidence was offered by the defendant except that it was stipulated that the witnesses who previously testified as to the character of the defendant, would be considered as having testified to the same things at this hearing. The Court, in an Entry filed September 7th., 1966 found that Buddy Lynn Whittington was a delinquent child as set forth in the complaint and that he had committed an act which would be a felony if committed by an adult. The Court, pursuant to Section 2151.26 of the Revised Code of the State of Ohio, ordered that William Rutherford, the Juvenile Probation officer, make a full investigation and report the same to the Court and further ordered that Buddy Lynn Whittington be committed to the Juvenile Diagnostic Center of the Ohio Youth Commission for a complete mental and physical examination, the results

of which were to be forwarded to this Court and the Court then continued this cause pending the investigation and the findings of the mental and physical examination of the defendant.

At the hearing on the motion for the Court to release the defendant on bond or to the custody of his parents, Mrs. Whittington, mother of Buddy Lynn Whittington, admitted that she had never been denied the right to see him; that Buddy had a television set there for his convenience; that he had magazines to read and that there had been no necessity to consult the doctor about Buddy because of his physical health or condition.

On September 12, 1966, the defendant filed a Notice of Appeal in the Juvenile Court from the order of the Court made and entered on the 7th day of September, 1966, wherein the Court found the defendant to be a delinquent child as set forth in the complaint.

A Notice of Appeal was filed in the Court of Appeals of Fairfield County, Ohio, on questions of law. The defendant also filed a Motion in the Court of Appeals to release the defendant to the custody of his parents or to fix bond. The Prosecuting Attorney filed a Motion in the Court of Appeals to dismiss the appeal because of the order appealed from was not a final order. Said motions were heard and the Court dismissed the motion of the Prosecuting Attorney to dismiss because the order appealed from was not a final order and, continued the matter of the defendants release upon bond pending the return of the report from the Juvenile Diagnostic Center of Ohio to the Juvenile Court of Fairfield County.

The Court of Appeals of Fairfield County, Ohio, heard and considered this cause and found that there had been no violation of the constitutional rights of the defendant and no error prejudicial to him. They also found that the

Juvenile Code was constitutional. They affirmed the judgment of the Juvenile Court and remanded the same to the Juvenile Court for further proceeding according to law.

On January 16, 1967, defendant-appellant filed a Notice of Appeal on questions of law to the Supreme Court of Ohio from the judgment and final order of the Court of Appeal. The Supreme Court of Ohio dismissed the appeal for the reason that no substantial constitutional question exists herein and overruled defendant-appellants motion directing the Court of Appeals for Fairfield County to certify his record.

On October 9th., 1967, the Supreme Court of the United States granted the petition for writ of certiorari and transfered the case to the appellant docket.

QUESTIONS PRESENTED

1. Was the order of the Juvenile Judge, finding that Buddy Lynn Whittington had committed an act which would have been a felony if committed by an adult and ordering him to the Bureau of Juvenile Research for psychiatric and physical examination, and continuing said cause until said report was received, a final appealable order?

2. Did the statutes of the Juvenile Code of the State of Ohio deny due process of law to Buddy Lynn Whittington in the following respects:

A. Does the fact that the Juvenile Judge received the sworn complaint, issued the warrant for his arrest and heard the case on its merits in the Juvenile Court, constitute a denial of due process to defendant-appellant.

B. Does the fact that the Juvenile Court is empowered to conduct its hearings in an informal manner on a complaint alleging a child to be a delinquent and, without the intervention of a jury, after a full investigation is made,

a psychiatric examination and physical examination is made, recognize a juvenile to the Court of Common Pleas to be treated as an adult, when the complaint alleges a child to be delinquent in that he has committed an act which would be a felony if committed by an adult; or to take other action as provided by law, deny due process to defendant-appellant?

C. Was petitioner denied due process and equal protection when: the juvenile court refused to release him to the custody of his parents or on bond pending his adjudicative hearing?

D. Was petitioner denied due process and equal protection in the proccedings which adjudicated him a delinquent, not a criminal, when the Juvenile Judge by Journal Entry found that the petitioner had committed an act which would have been a felony if committed by an adult; when the state appellate court affirmed the judgment of the Juvenile Court by finding that the judgment of the Juvenile Court was not against the manifest weight of the evidence?

3. Was petitioner denied due process by the admission into evidence of statements made by him to certain witnesses, including law enforcement officials, made by the petitioner in his own home, in the presence of his parents, as a part of the general on the scene investigation?

SUMMARY OF ARGUMENT

I.

This was a proceeding in the Juvenile Court, based upon a complaint in which the petitioner, a child 14 years of age, was alleged to have committed an act which would have been second degree murder if committed by an adult, and that said child was a delinquent child by reason of having committed said act. At a hearing on the merits of the case, the Court found that the petitioner had committed the act alleged in the complaint and, pursuant to Section 2151.26 of the Revised Code of the State of Ohio, the Court ordered a complete investigation of the case and a psychiatric and physical examination of the petitioner and, continued said cause pending the reports of said investigation and examinations.

This was the order appealed from and it is the contention of the respondent that this was not a final order and hence not appealable. This Court, at that time, had not made a final order disposing of the case. It was only after the reports had been received and the investigation completed that the Court would either dispose of the matter in the Juvenile Court or recognize the petitioner to the Common Pleas Court as provided by law. Until this was done, there was no final order.

II.

A. The Juvenile Judge is authorized by statute to receive complaints and to issue warrants for the arrest of juveniles within his jurisdiction if he deems the same to be necessary. The Juvenile Judge is also authorized by statute to hear complaints in an informal manner which would best serve the interest of the child involved.

In the instant case, the complaint was made by the Police Chief, after conferring with the Juvenile Probation

Officer and the County Prosecuting Attorney. The Complaint as drawn was submitted to the Judge of the Juvenile Court and a warrant for the arrest of the petitioner was issued by the Judge and the petitioner brought before the Court on the same date. The record affirmatively shows that no evidence was imparted to the Judge of the Juvenile Court concerning this case except in Court with the petitioner, his parents and counsel present. There is no showing of bias or prejudice on the part of the Juvenile Judge. The Petitioner was not charged with, and could not be convicted of any crime in the Juvenile Court. To say that the petitioner was denied due process of law because his case was heard by the Judge of the Juvenile Court, would be to say that the Juvenile Judge could not hear any complaints as to any child who was delinquent, dependent, crippled or neglected.

This was in the nature of a preliminary hearing and only one stage had been completed, prior to this appeal, in the Juvenile Court. To say that the petitioner did not receive due process of law in the Juvenile Court would be to deny the Juvenile Judge the right to hear and determine any matter.

B. The Constitution of the United States and of the State of Ohio provides for a jury trial for persons charged with crime of any magnitude. A juvenile, under present existing statutes of the State of Ohio, can neither be charged nor found guilty of a crime in the Juvenile Court. A finding of delinquency in the Juvenile Court cannot be used against a juvenile in any other court and cannot affect his civil rights in any manner.

To hold that a child charged with being a juvenile delinquent is entitled to trial by jury in the Juvenile Court would be to hold that a juvenile child is entitled to two jury trials before he could be convicted of a crime. We do

not believe the constitution so provides or was ever intended to be construed in this manner. If a jury trial were afforded to all children charged with being a delinquent child, this would completely nullify any benefits that the child might derive from a Juvenile Court and it would most certainly cause a backlog of cases in the Juvenile Court of this State. The delays made necessary would work to a detriment to the juvenile and the purpose for which the Juvenile Court was created would be destroyed.

C. Whether or not a juvenile child is to be detained pending a hearing in the Juvenile Court, is a matter within the sound discretion of the Court and bond is not a matter of right. Since a juvenile child is not charged with any crime in the Juvenile Court, the constitutional guarantees of bail are not applicable. The statute of Ohio gives the Court the authority to release a child in the custody of a parent, guardian, custodian or of a probation officer or other person appointed by the Court and, also gives the Court the right to detain said child if he finds that said child should be detained pending hearing.

If due process of law required that a juvenile was entitled to bond, it would defeat the entire purpose of the Juvenile Court Act and its duty to protect juveniles.

D. If we accept the fact that the Juvenile Courts were created for the purpose of aiding, assisting and rehabilitating children under the age of eighteen years, we must give the Juvenile Court the authority to deal with these children as we give parents the authority to deal with their children. In other words, the Juvenile Court stands in the relationship of being a parent to all juveniles and interested in what is best for their welfare. It is certain that no parent would be required to find that his child had committed a forbidden act beyond a reasonable doubt before he would be authorized to correct or punish said child.

We are not saying that a Juvenile Judge has never made an error in dealing with children, nor are we saying that parents do not make mistakes in judgment or otherwise in dealing with their children. What we must consider is what is best for the child and how we may best serve said child until he is competent to make his own decisions.

The burden of proof required in criminal cases, "beyond a reasonable doubt," is limited and confined to criminal prosecutions. It has no application in the Juvenile Court. The sole purpose of the Juvenile Court is to rehabilitate the child and not punish him. What useful purpose would it serve to say that a Juvenile Judge would have no control over a juvenile unless he found beyond a reasonable doubt that said child was delinquent, dependent, neglected or crippled. A child is by law required to go to school for a certain number of years or until he has graduated from high school. We do not consider this as being a denial of due process of law to compel him to go to school whether he wishes to or not. If a child is delinquent, neglected, dependent, or crippled, we give the authority, by statute, over said child to the Juvenile Court for the purpose of aiding said child. To say that the Juvenile Judge must find beyond a reasonable doubt that a child is dependent, delinquent, neglected or crippled, before he could take jurisdiction over said child, would defeat the purpose of the statute, which is to aid said child.

3. The statements made by the petitioner to witnesses, including law enforcement officials, were properly admitted into evidence in the instant case. It was shown that these statements were made as a part of the on-the-scene investigation within a matter of a few hours after the body had been found. Said statements were made in the home of the petitioner, in the presence of his parents and while the petitioner was not in custody. In fact the petitioner was

not taken into custody until a week had elapsed after the statements in question had been made.

The statements or admissions in this case certainly do not come within the prohibition of the Miranda Case. To hold that these statements would be inadmissible, would be to deny to peace officers the right to question anybody, no matter how general, at any time after a crime had been committed.

1. THE FINDING OF THE JUVENILE COURT THAT THE PETITIONER HAD COMMITTED AN ACT WHICH WOULD HAVE BEEN A FELONY IF COMMITTED BY AN ADULT IS NOT A FINAL APPEALABLE ORDER.

Before coming to the questions raised by the appellant, there is a threshold question of jurisdiction which must be raised and decided.

The Court of Appeals of Ohio made its determinations upon the basis that the decision of the Juvenile Court was a final order, from which an appeal was properly taken.

In its opinion, the Court of Appeals refers to Sec. 2501.02 Revised Code which provides that the Court of Appeals has jurisdiction:

> "Upon an appeal upon questions of law to review, affirm, modify, reverse or set aside or reverse final orders of courts of record inferior to the Court of Appeals within the district, including the finding, order, or judgment of a juvenile court that a child is delinquent, neglected, or dependent, for prejudicial error committed by such lower court."

The Court of Appeals laid its emphasis upon the words,

> "* * * including the finding, order, or judgment of a juvenile court that a child is delinquent, neglected, or dependent, * * *"

However, the key word of the statute is the word "final." It is only final orders that the Court of Appeals has juris-

diction to review. This elementary rule seems to have been overlooked by the courts below, but it is also elementary that the question of jurisdiction of the subject matter is always open, and may be raised at any stage of the proceedings.

The Constitution of the State of Ohio, Art. IV Section 6 gives to the Court of Appeals

> "* * * such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and of courts of record inferior to the court of appeals within the district."

Pursuant to this constitutional authority, the legislature enacted Chapter 2505 of the Revised Code, which is headed "Procedure on Appeal."

Section 2505.02 Revised Code defines the words "final order." It reads in part as follows:

> "An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, * * * is a final order * * *"

Thus the order of the Juvenile Court on September 2nd, 1966, from which this appeal was taken, must be viewed in the light of these provisions, and also in the light of the provisions of the Juvenile Code.

The statutory definition of a delinquent child, Section 2151.02 Revised Code, includes any child

> "(A) Who violates any law of this state * * *"

The Ohio Juvenile Code, in common with juvenile court laws generally, contains a provision for waiving jurisdiction over a child to the criminal courts under certain circumstances. In that respect, the Ohio statute, Section 2151.26 Revised Code, is very similar to the provision of the District of Columbia Code set forth on PP 547-548 of

Kent v. United States, 383 U.S. 541. The Ohio statute reads in part as follows:

> "In any case involving a delinquent child * * * who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after mental and physical examination of such child * * *, may order that such child enter into recognizance with good and sufficient surety, * * * for his appearance before the Court of Common Pleas at the next term thereof, for such disposition as the Court of Common Pleas is authorized to make for a like act committed by an adult; * * *"

This statute is analogous to the provisions of the criminal laws contained in Chapter 2937 of the Revised Code which deal with preliminary examination. Specifically, Sections 2937.10, 2937.11, 2937.12, and 2937.13 Revised Code set up the procedure for preliminary examination and binding over to the grand jury in cases of law violation by adults.

In part, these sections read as follows:

> "2937.10 *Hearing set in Felony Cases.*
>
> "If the charge be a felony, and there be no written plea of guilty or waiver of examination * * *, the court or magistrate, * * * may set the matter for hearing * * *
>
> "2937.11 *Presentation of the State's Case.*
>
> "At the preliminary hearing, * * * the prosecutor * * * shall then proceed to examine witnesses and introduce exhibits for the state * * *
>
> "2937.12 *Motion for Discharge; Presentation on Behalf of Accused; Finding of Court.*
>
> "(A) At the conclusion of the presentation of the state's case accused may move for discharge for failure of proof or may offer evidence on his own behalf. * * *
>
> "(B) Upon the conclusion of all the evidence * * *, the court or magistrate shall either:
>
> "(1) Find that the crime alleged has been committed and that there is probable and reasonable cause to hold or recognize the defendant to appear

before the court of common pleas * * * for trial pursuant to indictment by grand jury;

"(2) Find that there is probable cause to hold or recognize defendant to appear before the court of common pleas for trial pursuant to indictment or information on such other charge, felony or misdemeanor, as the evidence indicates was committed by accused;

* * *

"2937.13 *Basis for Finding; No Appeal; Further Prosecution.*

"In entering a finding, pursuant to Sec. 2937.12 of the Revised Code, the court, while weighing credibility of witnesses, shall not be required to pass on the weight of the evidence, and any finding requiring the accused to stand trial on any charge shall be based solely on the presence of substantial credible evidence thereof. No appeal shall lie from such decision nor shall the discharge of the defendant be a bar to further prosecution by indictment or otherwise."

It is quite apparent from the juvenile court's order of September 2, 1966, that the court was proceeding under Sec. 2151.26 Revised Code toward a possible order recognizing the child to the next term of the Court of Common Pleas for disposition as an adult who had violated a criminal statute, but had not yet reached the point at which such an order could properly be made.

The order contains a finding that the petitioner is a minor under the age of eighteen years, and had committed an act which would be a felony if committed by an adult. The court then orders a full investigation, commitment of the child for a complete mental and physical examination, and continues the case pending the receipt of reports of the investigation and the examination.

Granted, the order contains the language that "* * * the court * * * finds that said Buddy Lynn Whittington * * * is a delinquent child * * *." In view of the language of the

statute, Sec. 2151.26 Revised Code "In any case involving a delinquent child * * * who has committed an act which would be a felony, etc.", the preliminary order would probably be defective without a recital that the child was delinquent. It is clear, however, that since the actual order of the court, as distinguished from the preliminary findings, is merely that an investigation and report be made, and the child committed for a mental and physical examination and report, there was no final order from which an appeal would lie. The order does not determine the action and prevent a judgment. On the contrary, it merely lays the groundwork for a judgment which is yet to come. Depending upon the reports, this judgment may be a recognizance to the next term of the criminal court, or one of the dispositions provided for by the Juvenile Code, sections 2151.01 to 2151.54 Revised Code.

It is very clear from the decision of this Court in *Kent v. United States,* 383 U.S. 541, that as a condition to a valid order recognizing him to the criminal court, "petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court; and to a statement of reasons for the Juvenile Court's decision." Ibid at P. 557.

The record here shows that the juvenile court was proceeding in the direction of meeting these requirements, but had not reached the point of decision. The most that the order appealed from does is to direct the preparation of the "probation or similar reports" which both court and counsel had the right and duty to consider before reaching a decision "potentially as important to petitioner as the difference between five years confinement and a death sentence."

It in no way determined the action or prevented any judgment which the juvenile court could have made at the time the hearing was commenced.

It is perhaps unfortunate that Sec. 2151.26 Revised Code, which deals with children, does not contain the much more detailed procedural provisions of Sec. 2937.10 to 2937.13 which deal with adults. If it did, the provision of Sec. 2937.13 barring appeal, apparently inserted in the adult statutes out of an abundance of caution, would have required the dismissal of petitioner's appeal to the Court of Appeals. The fact remains, however, that in spite of the difference in detail between the juvenile and adult statutes, the basic situation and the ultimate resolution are both the same. In both, there is a charge that defendant has committed a crime. In both, the final order is a recognizance to the grand jury, which may return a true bill or no bill. In both, a true bill will result in arraignment, plea, and trial by jury, which petitioner claims he was denied.

Since the beginning and end are identical, it follows that the intermediate steps must in effect be the same. The court does not weigh the evidence, and a finding requiring accused to stand trial need be based only on the presence of substantial credible evidence of guilt, no more.

Thus, the respondent contends that when the record in this case is viewed in the light of the statutes of Ohio and the decision of this Court in *Kent v. United States,* 383 U.S. 541, it is clear that none of the questions which the petitioner claims are presented are in fact presented, because there is no final order, either binding him over to the criminal court, or adjudging him to be a delinquent child, and disposing of him as such.

As a further argument that the finding by the Juvenile Court, that the defendant had committed an act which

would have been a felony had it been committed by an adult, is not a final order and therefore cannot be appealed, the following is submitted. Section 2947.25 of the Revised Code of the State in Ohio provides in substance that after conviction and before sentence all persons convicted of certain sex crimes must be referred for psychiatric examination to a department, clinic or psychiatrists for a period of not more than sixty days, to determine if such person is mentally ill, or a mentally deficient offender or a psychopathic offender. The constitutionality of this section has been challenged and, in the case of *The State of Ohio, Appellee v. Thomas, Appellant.* 175 O.S. 563, it was held that the referral of a person by a court of competent jurisdiction, after conviction and before sentence, to an approved state facility for observation for a period of not more than sixty days, is not a final appealable order but a procedural incident, and in accordance with Section 2953.05 Revised Code, any appeal must await and follow the imposition of sentence.

In the instant case, this appeal was taken before the Juvenile Court had an opportunity of making a final order. Hence, the appeal is premature and should be dismissed.

2. THE STATUTES COMPRISING THE JUVENILE CODE OF THE STATE OF OHIO DO NOT DENY DUE PROCESS OF LAW TO JUVENILES

The Juvenile Code of Ohio is contained in Chapter 2151 of the Ohio Revised Code and consist of Sections 2151.01 to 2151.99 of said Revised Code.

"Section 2151.01—Definitions.

(A) As used in the Revised Code, "juvenile judge" or "juvenile court" means the judge or the court exercising the powers and jurisdiction conferred in sections 2151.01 to 2151.54, inclusive, of the Revised Code.

(B) As used in sections 2151.01 to 2151.54, inclusive of the Revised Code:

(1) "Child" includes any child under eighteen years of age, except that wherever reference is made in such sections to a crippled or otherwise physically handicapped child "child" includes any person under twenty-one years of age.

(2) "Adult" includes any person eighteen years of age, or over, who is not a "child" within the meaning of division (B) (1) of this section." [the remainder of this section is not quoted as not being important to this case].

"Section 2151.02—"Delinquent Child" Defined.

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "delinquent child" includes any child:

(A) Who violates any law of this state, the United States, or any ordinance or regulation of a sub-division of the state, except as provided in section 2151.021 of the Revised Code:

(B) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian by reason of being wayward or habitually disobedient;

(C) Who is an habitual truant from home or school;

(D) Who so deports himself as to injure or endanger the morals or health of himself or others;

(E) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority."

"Section 2151.021 — "Juvenile Traffic Offender" Defined.

A child who violates any traffic law, traffic ordinance, or traffic regulation of this state, the United States, or of any subdivision of this state, shall be designated as a "juvenile traffic offender" and shall not be designated as a delinquent unless it be so ordered by the court after hearing the evidence."

"Section 2151.03—"Neglected Child" Defined.

As used in sections 2151.01 to 2151.54 inclusive, of the Revised Code, "neglected child" includes any child:

(A) Who is abandoned by his parents, guardian, or custodian;

(B) Who lacks proper parental care because of the faults or habits of his parents, guardian, or custodian;

(C) Whose parents, guardian, or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals, or well being;

(D) Whose parents, guardian, or custodian neglects or refuses to provide the special care made necessary by his mental condition;

(E) Who is found in a disreputable place, visits or patronizes a place prohibited by law, or associates with vagrant, vicious, criminal, notorious, or immoral persons;

(F) Who engages in an occupation prohibited by law, or is in a situation dangerous to life or limb, or injurious to the health or morals of himself or others."

"Section 2151.04—"Dependent Child" Defined.

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "dependent child" includes any child:

(A) Who is homeless or destitute or without proper care or support, through no fault of his parents, guardian or custodian;

(B) Who lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian;

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship."

"Section 2151.05—"Child Without Proper Parental Care"

Under sections 2151.04 to 2151.54, inclusive, of the Revised Code, a child whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, neglected, or delinquent; whose parents, stepparents, guardian, or custodian, when able, refuse or neglect to provide him with necessary care, support, medical attention, and educational facilities; or whose parents, stepparents, guardian, or custodian fail to subject such child to necessary discipline is without proper parental care or guardianship."

"Section 2151.23—"Jurisdiction"

(A) The juvenile court has exclusive original jurisdiction under the Revised Code:

(1) Concerning any child who is a juvenile traffic offender or who is delinquent, neglected, dependent, crippled, or otherwise physically handicapped;

(2) To determine the custody of any child not a ward of another court of this state;

(3) To determine the paternity of any child alleged to have been born out of wedlock and to provide for the support of such child, subject to the concurrent jurisdiction of other courts;

• • •

(D) Such court has jurisdiction to hear and determine the case of any child certified to the court by any court of competent jurisdiction, and to make disposition of said child in accordance with sections 2151.01 to 2151.54, inclusive, of the Revised Code."

"Section 2151.25—"Arrest of Child"

When a child is arrested under any charge, complaint, affidavit, or indictment, whether for a felony or a misdemeanor, such child shall be taken directly before the juvenile court. If the child is taken before a judge of a county court, mayor, judge of the police or municipal court, or judge of the court of common pleas other than a juvenile court, such judge of a county court, mayor, judge of the police or municipal court, or judge of the court of common pleas shall transfer the case to the juvenile court. The officers having such child in charge shall take him before the juvenile judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before him in the first instance. Upon such transfer or taking of such child before such judge, all further proceedings under the charge, complaint, information, or indictment shall be discontinued in the court of said judge of a county court, mayor, police or municipal judge, or judge of the court of common pleas other than a juvenile court, and the case relating to such child shall thenceforth be within the exclusive jurisdiction of the juvenile court and shall be deemed to be upon a complaint filed in such court as fully as if the appearance of such child had been upon a complaint filed in and a citation or warrant of arrest originally issued by such court."

"Section 2151.26—"Child Charged with Felony"

In any case involving a delinquent child under sections 2151.01 to 2151.54, inclusive, of the Revised Code, who

has committed an act which could be a felony if committed by an adult; the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the Bureau of Juvenile Research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case."

"Section 2151.27—"Complaint Involving Child"

Any person having knowledge of a child under eighteen years of age who appears to be a juvenile traffic offender or to be delinquent, neglected, or dependent, or of a crippled or otherwise physically handicapped child under twenty-one years of age may, with respect to such juvenile traffic offender or such delinquent, neglected, or dependent child, file a sworn complaint, and with respect to such crippled or otherwise physically handicapped child file an application for care in the juvenile court of the county in which such child has a residence or legal settlement, or in which such traffic offense, delinquency, neglect or dependency occurred, or in case of a crippled child, where such child is found. Such application or sworn complaint may be upon information and belief and, except for traffic offenses, shall be sufficiently definite by using the word delinquent, neglected, dependent, crippled, or physically handicapped, as the facts may be."

"Section 2151.28—Citation of Parties; Hearing; Subpoena.

After a complaint or an application for care has been filed under section 2151.27 of the Revised Code, and after such further investigation as the juvenile court directs, unless the parties voluntarily appear, the court shall issue a citation reciting briefly the substance of the complaint or application and requiring the parents, guardian, or the persons who have the custody or control of the child, or with whom such child may be, to appear personally and bring the child

before the court at the time and place stated. If the person cited is other than the parent or guardian of the child, then the parent or guardian, or both, shall also be notified of the pendency of the case and of the time and place of hearing.

Before any temporary commitment is made permanent, the Court shall fix a time and place for hearing and shall cause notice thereof to be served upon the parent or guardian of the child, or published, as provided in section 2151.29 of the Revised Code.

Any person whose presence is considered necessary and who is not cited may be subpoenaed to appear and testify at the hearing. Any one cited or subpoenaed to appear who fails to do so may be punished, as in other cases in the court of common pleas, for contempt of court. Persons subpoenaed shall be paid the same witness fees as are allowed in the court of common pleas.

If it appears that the child is in such conditions or surroundings that his welfare requires that his custody be immediately assumed by the court, the juvenile judge may cause an order to be indorsed upon the citation that the officer serving the same shall take the child into custody at once."

"Section 2151.31—Custody of Child Pending Hearing; Child May be Fingerprinted.

Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the juvenile court, accept the written promise of the parent, guardian or custodian to bring the child to the court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the Court, or taken immediately to the court or to the place of detention designated by the court, and the officer taking such child shall immediately notify the court with a written report of the condition or situation which caused the child to be brought in and shall file a complaint when directed to do so by the court.

In the case of any child whose custody has been assumed by the court, pending the final disposition of the case, the child may be released in the custody of a parent, guardian, or custodian, or of a probation officer

or other persons appointed by the court, to be brought before the court at the time designated. When not released, such child, pending the hearing of the case, shall be detained in such place as shall be designated by the court, subject to further order. This section does not forbid any peace officer, police officer, probation officer, or other person authorized by the juvenile judge from taking into custody any child who is found violating any law or ordinance, or who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, morals, or welfare."

"Section 2151.34—Place of Detention for Children: District Detention Home.

No child under eighteen years of age shall be placed in or committed to any prison, jail or lockup, nor shall such child be brought into any police station, vehicle, or other place where such child can come in contact or communication with any adult convicted of crime or under arrest and charged with crime; provided that a child fourteen years of age or older may, for good cause shown, and with the consent of the juvenile judge or a person designated by him, be placed in a place of detention for adults, but in a room or ward separate from adults. All children under eighteen years of age, when confined in such places of juvenile detention, shall not be detained for a period to exceed ninety days during which time a social history can be prepared to include court record, family history, personal history, school and attendance records, and as such other pertinent studies and material as will be of assistance to the juvenile court in its disposition of the charges against such juvenile offenders."

* * *

"Section 2151.35.—Informal Hearing: Right of Child to Counsel; Disposition; School District to Bear Cost.

The juvenile court may conduct its hearings in an informal manner, and may adjourn such hearings from time to time. In the hearing of any case the general public may be excluded and only such persons admitted as have a direct interest in the case. The juvenile court shall permit a child to be represented by an attorney at law during any hearing before such court and shall

extend to such child all the rights and privileges of section 2935.14 of the Revised Code. Such attorney at law, the parents or guardian of such child, and any attorney at law representing them shall be entitled to visit such child at any reasonable time and to be present at any hearing involving the child and shall be given reasonable notice of such hearing. Any report or part thereof concerning such child which has been prepared by an employee of the court which is used in the hearing and is pertinent thereto shall for good cause shown be made available to any attorney at law representing the parents or guardian of such child, upon written request prior to any hearing involving such child. All cases involving children shall be heard separately and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in cases involving neglected, dependent, or crippled children. The court shall hear and determine all cases of children without a jury. If the court finds that the child is a juvenile traffic offender or is delinquent, neglected, or dependent, it may by order enter proceed as follows:

(A) Place the child on probation, under supervision in its own home, in the custody of a relative, in an institution, or in a certified foster home, wherever situate, upon such terms as the court shall determine; provided that the court may place delinquent children on a free or wage basis in uncertified foster homes, or may place such delinquent children in foster care facilities approved by the youth commission under the provisions of sections 5139.36 to 5139.40, inclusive, of the Revised Code. The court shall, at the time of placing the child, determine which school district must bear the cost of educating the child while he is residing at such place as the court directs. The decision of the court concerning the expense of the child's education shall be made a part of the order provided by this section;

(B) Commit the child temporarily or permanently to the division of social administration of the department of public welfare, or to a county department of welfare which has assumed the administration of child welfare, county child welfare board, or certified organization, or to the youth commission or to a county or district train-

ing facility created under section 2151.65 of the Revised Code, or to any institution, or to any agency in Ohio or in another state authorized and qualified to provide or secure the care, treatment, or placement required in the particular case;

(C) Impose a fine upon a juvenile traffic offender or a delinquent child not exceeding fifty dollars and costs;

(D) Make such further disposition as the court deems proper;

(E) Commit a male child over sixteen years of age who has committed an act which if committed by an adult would be a felony to the Ohio State Reformatory;

(F) Suspend or revoke the operator's or chauffeur's license issued to any minor found to be a juvenile traffic offender;

(G) Suspend or revoke the registration of all motor vehicles registered in the name of any minor found to be a juvenile traffic offender.

Whenever a child commits an act of delinquency before arriving at the age of eighteen years, and the specific complaint thereon is not filed or hearing held until after said child arrives at the age of eighteen years, the court shall have jurisdiction to hear and dispose of such complaint, as if the complaint were filed and hearing held before such child arrived at the age of eighteen years.

The judgment rendered by the court under this section shall not impose any of the civil disabilities ordinarily imposed by conviction, in that the child is not a criminal by reason of such adjudication, nor shall any child be charged or convicted of a crime in any court, except as provided in section 2151.26 of the Revised Code. The disposition of a child under the judgment rendered or any evidence given in the court shall not be admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of such child may be considered by any court only as to the matter of sentence or to the granting of probation. Such disposition or evidence shall not operate to disqualify a child in any future civil service examination, appointment, or application.

> Whenever a court commits a child to the division of social administration, the department of public welfare, or to any department, board, institution, or agency it shall transmit with the order of commitment an adequate case history of the child and its family. With respect to a crippled or otherwise physically handicapped child, who is neither delinquent, neglected, nor dependent, the court may commit the child temporarily to the division or to any agency in Ohio authorized and qualified to provide or secure the care, treatment, or placement required in the particular case."

The above statutes are quoted for the purpose of showing that they are not in conflict with the guidelines as set forth in the *Kent* case and in the *Gault* case. These statutes, comprising a part of the Juvenile Code of the State of Ohio, show that the Juvenile Judge is really placed in a position of being a father to all juvenile children, whether they are delinquent, neglected, dependent or crippled, either mentally or physically and, that the sole purpose of the Juvenile Court Code is to provide protection and help for the juvenile child on the basis that he or she has not attained sufficient maturity to adequately protect or provide for themselves. A juvenile child may not be found guilty of any crime, or sentenced as a criminal for any offense known to our law. Every statute of the Juvenile Court Act can only be interpreted as separating children from adults with the purpose of assisting or helping said child to become a useful and beneficial citizen, both for himself and society of which he is a part.

A consideration of the Ohio Statutes set forth above will show that a juvenile is entitled to notice of the substance of any complaint against him as provided in Section 2151.28 of the Revised Code of Ohio, and, his parents, guardian or person having custody, care or control of said child is also entitled to notice.

Said child is entitled to a speedy hearing; is entitled

to counsel of his own choosing at every stage of the proceeding; may subpoena witnesses in his behalf; have a record made of the proceedings and, if found to be a delinquent child is entitled to appeal on questions of law to any higher court. The statute further provides that a juvenile may not be confined in any place where he may come into contact or communication with any adult convicted of crime or under arrest and charged with the crime. Section 2151.35 above, further provides that a judgment rendered by the juvenile court against a juvenile shall not impose any of the civil disabilities ordinarily imposed by conviction, in that the child is not a criminal by reason of such adjudication and, that any evidence given in the juvenile court shall not be admissible as evidence against the child in any other case or proceeding in any other court.

In view of the above, how can it be said that a proceeding against a juvenile in the Juvenile Court is a criminal proceeding. The mere fact that a child may be incarcerated by the Juvenile Court, after he has been found to be a delinquent child, does not make it a criminal proceeding. *In Re Darnell,* 175 O.S. 335, Chief Justice Weygandt, in that case quoted from the case of *Prescott vs. State,* 19 O.S. 184 as follows:

> "The provisions referred to in our state constitution relate to the preservation of the right of trial by jury, and to the rights of the accused in criminal prosecutions. We do not regard this case as coming within the operation of either of these provisions. It is neither a criminal prosecution, nor a proceeding according to the course of the common law, in which the right to a trial by jury is guaranteed.
> The proceeding is purely statutory, and the commitment, in cases like the present, is not designed as a punishment for crime, but to place minors of the description, and for the causes specified in the statute, under the guardianship of the public authorities

named, for proper care and discipline, until they are reformed, or arrive at the age of majority."

Judge Weygandt also quoted from the case of *Wissenburg v. Bradley, Judge,* 209 Iowa 813, as follows:

"The statute not being criminal in its nature, nor designed for punishment, and the commitment being for the benefit of the child and for its education and reformation, and to an industrial school or similar institution, the due process of law clause does not, in such a case, require a jury trial."

It is to be noted that a child does not have to commit any crime or violate any law for the court to take custody of said child and confine them to a foster home or a childrens home. The child can also be found to be a delinquent child for a number of reasons other than having engaged in a course of conduct which would be a violation of law if done by an adult. Is there any difference between a statute which requires a child to go to school to learn how to behave and to earn a living as an adult, than a statute which authorizes a Juvenile Judge to commit a child to a foster home, a childrens home or an industrial school after he has found said child to be a delinquent, neglected or dependent child.

There is no authority in the Juvenile Code of the State of Ohio to convict any child of any crime unless and until said child is recognized to the Common Pleas Court. If this is done our code provides that bond must be fixed by the Juvenile Court and he is then entitled to all the rights of an adult and is subject to the same penalties.

2-A. DOES THE FACT THAT THE JUVENILE JUDGE RECEIVED THE SWORN COMPLAINT, ISSUED THE WARRANT FOR HIS ARREST AND HEARD THE CASE ON ITS MERITS IN THE JUVENILE COURT, CONSTITUTE A DENIAL OF DUE PROCESS TO DEFENDANT-APPELLANT?

We refute the fact that there was not an impartial trier of fact in this case based on the transcript of what happened and we refer to page 199 etc., of the record:

"The Court: Well, let's get to that right now. The allegation in the Motion is that the statutes require the Investigating Officer to submit facts to the Judge of this Court as the basis and grounds for issuing a warrant and a Complaint for the arrest of the same, who would be tried by the same Judge. Now, let's get to the point whether or not he did submit facts to the Judge in order to have a warrant issued and a Complaint made. That's the thing I'm interested in knowing right now."

Mr. Kistler: Mr. Rutherford, after you made the investigation as Investigation Officer of this Court, did you advise the Juvenile Judge anything at all in regard to your investigation?

A. Yes sir, I did.

Q. And did you submit to the Judge and advise the Judge of facts which would authorize the issuing of a warrant? A. No sir, I did not. The Judge was not consulted as to whether a warrant should be issued or charges should be brought. Mr. Morehart, the Prosecuting Attorney, is my legal advisor, and I conferred with him and Mr. Phillips in Mr. Morehart's Office, and a decision was made then.

Q. Before the affidavit was filed and before the warrant was issued by this Court, did you advise the Court of your findings? A. I advised the Court as to the situation that had happened, as to the evidence and what had happened. I didn't at that time have a lot of evidence, and the evidence was not confined to the Judge, no sir.

Q. Did you advise the Court of your findings as a result of your investigation? A. I advised him I had been called there and that I was there and the type of situation that arose.

— Q. So that you did advise him as to who was being accused and — A. No one was being accused.

The Court: Wait a minute. You're getting far afield. The point is, Mr. Rutherford, is this a Journal Entry that was signed by me authorizing the issuance of a warrant?

A. Yes sir, it is.

The Court: Now that was signed by me and presented to me for signature, when?

A. It's filed on August 5th.

The Court: Was that pursuant to any of your information or was it pursuant to something else?

A. This was pursuant to a Complaint that was filed by Elwood Phillips in this Court.

The Court: Is this that complaint?

A. Yes sir, it is.

The Court: Is that what you presented to me for the basis of my ordering a warrant?

A. That's right."

* * *

"Q. Now then Mr. Rutherford, before any Complaint was filed in this Court, did you not advise the Court of your investigation and your findings and what you found the evidence to be and your conclusion in regard to the matter? A. No sir, I did not. I informed the Court of the investigation, the kind of investigation, who was involved, but as to the evidence, I did not."

There is no evidence in the record to show that Judge Hastings knew of the evidence in this case prior to any hearings on the matter.

It is of importance here that no charge was made, or can be supported, that the Juvenile Judge in this case relied on any secret information from his staff or otherwise. This is not a case where the record is silent as to ex parte evidence but there is definite affirmative evidence by the probation officer, in the presence of the Juvnile Judge, that no "evidence" was revealed.

In this area, as in many others throughout this case, the defendant-appellant is asking the Court to follow the same strict procedural guidelines for juveniles that seem proper for adults.

If we are to believe there is any iota of merit to the past century of juvenile law, its goals and its accomplishments, then the informal atmosphere and the parental spirit of the Juvenile Code must be preserved. If we remove all the informality, all the discretion, all the strengths of the juvenile system, then this defendant and the thousands who follow in his regimented footsteps have lost.

Judge Don J. Young, Jr., formerly of the Huron County, Ohio Juvenile Court in an address printed in 13 OO 2d 1 says:

> "In the conflict between the opposing forces of critics of the juvenile courts, we must resist to the utmost the efforts of those who would make the law a rigid and dehumanized thing. The greatest feature of our system of law is that it can grow and change with the advances of human knowledge, and adapt itself to social complexities undreamed of when its principles were first formulated. But this power to grow and change only exists when the law is a part of man and men's lives. When the law becomes a thing apart from men and their lives, a force over them but not of them, it also becomes immutable and unchanging so that it can no longer meet the new and greater demands that accompany the growth and progress of society. Those of our profession who work in the juvenile courts and who have looked back into history are particularly aware of the problems inherent in trying to make the law a rigid and inflexible system."
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> • • •
>
> "The whole idea of the modern juvenile court law is that by a flexible and intelligent approach to the individual child and his problems, we may bring the child, no matter how disturbed, to a stable and useful adulthood. Sense, not sentiment; intelligence, not emotion, are the reasonable way to the solution of complex problems. Although there can be no question that our

juvenile courts are a typical development of the common law, which always produces from ancient principles and precedents an effective answer for new or more pressing problems, there are far too many people today who, from lack of real experience or understanding or from mistaking a little learning for wisdom, urge a return to the rigidities of the criminal law in dealing with troubled children; people who so worship the Bill of Rights in the Federal Constitution, or the due process clause of the Fourteenth Amendment, that they want to use them indiscriminately, and to apply them to situations which they were never intended to govern. As one learned judge very recently expressed it, "But the simple, succinct phrases of the Bill of Rights, indestructible protections to some of the fundamentals of our way of life, can be, and often are, expended by rhetorical inflation beyond all semblance to the realities with which they were meant to deal. ***"

* * *

"At this point I would like to get just a little bit technical for a moment, to call attention to one of the great fundamentals of our system of constitutional government, the doctrine of the separation of powers, which is sometimes referred to as our system of checks and balances. Much of the criticism of the juvenile court on so-called "constitutional" grounds shows a lamentable disregard of this important principle. The critics disregard the maxim that the function of the judicial branch of the government is "jus dicere, non jus dare" to interpret the law, not to make it. One writer states that it is too hard to get all of the state legislatures to make a change which he believes desirable in the juvenile court statutes, so he proposes that the change should be accomplished by a broader interpretation of the due process clause of the Fourteenth Amendment. This is an unequivocal proposal of judicial legislation. Repeatedly judges in their decisions are challenging the right of the legislature to define what actions shall constitute crimes, by such expressions as "Precious constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings." Our constitutionalists should

get back to taking the Constitution as a whole, and not picking out those clauses which suit their purpose and using them as slogans, or with the idea that the mere mention of the magic words is an irrefutable argument. Then perhaps they could do as we nisi prius judges are required to do, and accept the precedents which hold inequivocally that in this country, the power of parens patriae is vested in the legislature, which has the sovereign right to determine the manner of the its exercise".

2-B. THE FACT THAT A JUVENILE IS NOT ENTITLED TO A JURY TRIAL IN THE JUVENILE COURT WHEN CHARGED WITH BEING A DELINQUENT CHILD, IS NOT A DENIAL OF DUE PROCESS OF LAW.

The defendant-appellant has completely missed the point in his argument concerning a jury trial for Buddy Lynn Whittington.

They argue that this case involves a "serious law violation" whereas in fact it does not involve a "crime". It is no more serious or less serious than any other act committed by any other person charged with being a "delinquent child".

In the March 1967 issue of the American Bar Association Journal, Noah Weinstein, and Corinne R. Goodman, of the Juvenile Court of St. Louis County, Missouri use the following language:

"Some commentators suggest, perhaps with tongue in cheek, that jury trials be used in juvenile court proceedings. No reason is given to support this proposal other than a suggestion vaguely reminiscent of that famous phrase: "What's good for General Motors is good for the nation." It is interesting to note that the American Civil Liberties Union, which prepared appellant's brief in the Gault case, did not present that question for review. Nor do we feel that trial by jury should be extended to juvenile court cases, since the juvenile court is not a criminal court but a court

established, in Missouri by constitution and status, with particular responsibilities in dealing with and protecting children."

* * * * * * * *

"As to the right to a public trial, Missouri specifically provides that "The general public shall be excluded (from a court hearing) and only such persons admitted as have a direct interest in the case or in the work of the Court." We fail to see what benefit the public would receive from hearing details about incest, a child brutally beaten by his parents or a mentally ill child who stabs his playmate. If the basic elements of due process are observed with the protection right to appeal the judge's order, any involvement of the general public is totally unnecessary. But one must distinguish betwen public trials and secrecy. Secrecy must be avoided and the proceedings of the court must always be open to all interested persons, including the press".

This latter comment on the protection of due process and the right of a juvenile to appeal seems most commendatory and is provided for under present Ohio Law.

The Fifth Amendment to the United States Constitution provides that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.

Article I, Section 10, of the Ohio Constitution protects the rights of persons charged with crime in providing that in all felony cases, there must be presentment by a grand jury, a speedy public trial by a jury in the county where the crime was committed, the right to appear in person and with counsel, to demand the nature and cause of the accusation against him and to have a copy thereof, as well as

other guarantees for him to properly prepare and maintain his defense.

In the instant case, since the petitioner was charged with having committed an act which would have been a felony if committed by an adult, he could not be found guilty of committing a crime before an indictment had been returned against him by a grand jury and then been tried and found guilty by a jury.

Under the statutes of the Juvenile Code of Ohio, no child can be convicted of any crime unless and until he has been found to be a delinquent child by the Juvenile Court, and only then when the act committed would have been a felony if committed by an adult, has been recognized to the Common Pleas Court, been indicted by a grand jury and tried before an impartial jury and found guilty, with all of the protection and rights which are afforded to adults who commit the same crime.

In the instant case, the petitioner, Buddy Lynn Whittington, was not charged or found guilty of any criminal offense in the Juvenile Court. He was, after the Court found that he had committed an act which would have been a felony if committed by an adult, after a full investigation had been made, a complete psychiatric and physical examination had been made, recognized to the Court of Common Pleas and bond fixed by the Juvenile Court. From this point on, the petitioner is entitled to all the rights and protection of the law afforded to adults and is subject to all the penalties of the same.

There is no provision in our statutes for a juvenile ever to be found guilty of any crime less than a felony. He cannot be recognized to any other court unless the act he is charged with committing would constitute a felony if he were not a juvenile. To provide that a juvenile is entitled to a jury trial in the juvenile court when he is charged

with being a delinquent child, is to say that a juvenile child cannot be found guilty of a criminal offense until he has had two jury trials by a petit jury and a hearing before a grand jury with an indictment returned against him. We do not believe that due process of law requires two jury trials for a person who has violated a criminal statute which would constitute a felony.

To provide that, in order to constitute due process of law, a child charged with being a delinquent in the Juvenile Court is entitled to a jury trial would take away from the Juvenile Judge the authority which is absolutely necessary if he is to help, aid or benefit the juvenile delinquent. This would be the same as saying to a father or a mother that you cannot discipline your child unless you first had a jury trial to determine if he was a delinquent. We do not claim that a Juvenile Judge is infallible in his decisions concerning juveniles and, it certainly cannot be contended that a jury always bases its decisions and findings on the facts presented.

A father or mother may frequently make mistakes as to who is right or wrong in a parent-child relationship, or among their children, but nothing has yet been found to take the place of a sincere, dedicated parent to combat juvenile delinquency or to insure that their children mature into law abiding citizens.

If a jury of twelve is interposed between the juvenile and the Juvenile Judge, you destroy the whole intention and purpose of the Juvenile Code which was meant to aid, assist, protect and rehabilitate the juvenile delinquent as well as to protect the crippled, neglected or dependent children.

The Brief of Amicus Curiae, The Defender's Office, Cleveland Legal Aid Society in support of Petitioner, recites that for the year 1966, there were 19,394 cases of

all types filed in the Juvenile Court of Cuyahoga County, Ohio. Of this number, 7,296 were delinquency cases, an increase of 12% over 1965. Of the 7,296 delinquency cases only 16 boys were transferred to the Common Pleas Court to face charges as an adult.

How many years would it take to dispose of 7,296 cases if each were entitled to and demanded a trial by jury? How would it be possible for the Juvenile Court to aid, assist or protect juveniles if the Court had to wait two or three years before it could do anything for the juvenile? If the juvenile, charged with being a delinquent child, is entitled to a trial by jury and to bond, all he has to do is to post bond and wait his turn to be tried by jury. In the meantime, he has probably become an adult and there is a great probability that not even the Court can do anything to help him after this length of time with nothing being done. If a juvenile is to be helped and, if juvenile delinquency is to be curbed, the Juvenile Court must have authority to act and act immediately. It must be able to act as a parent should act for the best interest of the child. The parent must not abuse his authority in dealing with his child and, the Court must not abuse the discretion given it by the law. If the Court does abuse its discretion, there is a remedy provided by law for appeal.

2-C. WAS PETITIONER DENIED DUE PROCESS AND EQUAL PROTECTION WHEN: THE JUVENILE COURT REFUSED TO RELEASE HIM TO THE CUSTODY OF HIS PARENTS OR ON BOND PENDING HIS ADJUDICATIVE HEARING?

The question raised by this appeal concerns facts that arose prior to and at the hearing of September 2, 1966. Subsequent proceedings or facts that arose after that time should have no factual bearing on this case.

With this preface, we confine ourselves to facts that arose between August 5, 1966, the date Buddy Lynn Whittington was arrested and confined, until and including the hearing in the Juvenile Court of Fairfield County on September 2, 1966, which hearing and facts preceding such hearing are the basis for this appeal.

At the times in question, Buddy Lynn Whittington was charged with being a delinquent child, in that he had committed a homicide which, under Ohio Law, was classed as second degree murder.

Section *2151.31 of the Revised Code of Ohio* provides as follows:

> "Whenever any officer takes a child into custody, he shall, unless it is impracticable *or has been otherwise ordered by the juvenile court,* accept the written promise of the parent, guardian, or custodian to bring the child to the Court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not released, such child shall be placed in the custody of a probation officer or other persons designated by the Court, or taken immediately to the Court *or to the place of detention designated by the Court* and the officer taking such child shall immediately notify the Court with a written report of the condition or situation which caused the child to be brought in and shall file a complaint when directed to do so by the Court." (emphasis added)

Judge Hastings of the Fairfield County Juvenile Court, acting upon this authority, ordered the defendant held in the juvenile quarters of the Fairfield County jail where he remained from the time he was incarcerated until September 2, 1966.

A hearing on the question of bond was held on August 25, 1966, and at the hearing a number of witnesses for the defendant testified as to his good character, and these witnesses expressed their feeling that the defendant was inno-

cent of the charge against him. Upon cross-examination, most of these witnesses for the defendant admitted that if he or she thought the defendant was guilty then their answers could or would be different.

The Judge, in his findings at that hearing, said:

> "The Court: Well, the Court has this to say. This isn't a case of what public opinion, popularity poll, might be about this thing. This Court has a responsibility to this community. This Court has a responsibility to this young man. Motion denied."

In the January 1967 issue of the American Bar Association Journal, Judge Bertran Polow of the Morris County, New Jersey Juvenile and Domestic Relations Court in discussing "The Juvenile Court" uses the following language:

> "The right to bail would also be inconsistent with juvenile court philosophy. The arguments against the bail concept, under intensive attack even in the criminal field, are particularly compelling in the juvenile court. Freedom or confinement of a juvenile should not depend upon the financial status of the child or his parents. Accordingly, in cases where it is found necessary to detain a juvenile prior to final hearing, an expeditious preliminary or detention hearing is essential. Only the judge should have the responsibility to deprive a child of liberty. The almost universal procedure is to release the alleged offender in the custody of his parents if they are reasonably capable of handling him. A child should be confined pending final hearing only when it is necessary for his protection or that of the community."

In *State ex rel Peaks vs. Allaman*, 51 OO 321 The Court held that:

> "A minor detained in a Detention Home as the result of the filing of a delinquency affidavit under Section 1639-23, et seq., G.C., and refused bail under Section 1939-27, GC., because under said section such release is not mandatory, is being lawfully detained since under the provisions of Section 1639-30 GC., he is not charged with an "offense" and therefore not entitled to release on bail under the provisions of Article I, Section 9, of the Ohio Constitution."

We agree that the right to bail would be inconsistent with Juvenile Court philosophy. Freedom or confinement of a juvenile should not depend upon the financial status of the child or his parents, and only the judge should have and does have the responsibility to deprive a child of liberty. A juvenile should be confined pending a final hearing when it is necessary for his protection or that of the community and Judge Hastings so stated in this case. It must be remembered that a juvenile court does function in loco parentis, and it is absolutely necessary that some court or other organization, if not the Juvenile Court, act in this capacity. Is a child entitled to be released on bail from its parent's custody? May a child, by the simple device of posting bond, acquire the right to go where it pleases without let or hindrance? Should parents be able to post a bond and thus return a child to a home that is an unfit place for a child to be? If this be true you then defeat the purpose of the Juvenile Court and prevent the Court from doing what it was intended to do, which is to help juvenile children who are unable to help themselves.

The petitioner has contended that Buddy Lynn Whittington was always held in solitary confinement and that this constituted cruel and inhuman punishment in violation of his constitutional rights. This is a false statement. He was confined in the juvenile quarters of the Fairfield County Jail, separate and apart from the adult prisoners.

Mrs. Whittington, mother of petitioner, testified in a hearing on a motion of the petitioner to release him to his parents or fix bond for him, as follows: (A. 100)

"Cross-examination.

By Mr. Morehart:

Q. Mrs. Whittington, do you go to see Buddy? A. Yes, sir.

Q. How frequently do you go? A. Every day.

Q. Every day. Have you ever been denied the right to see him? A. No sir.

Q. Does Buddy have a television set there? A. Yes sir.

Q. Does he have anything to read? A. Well, he could have if he wanted something to read.

Q. If he wants to read, he could read, I mean; its available? A. Well not there, but we could take it if he wanted it.

Q. And nobody would object to that? A. I don't think so. I never asked, but I don't think so.

Q. But you think he doesn't want anything to read, is that right.

At least, he never asked for anything? A. Well, he reads some. He has some magazines there that he reads.

Q. He does have some magazines that he reads, and he has the television set? A. Yes."

If Buddy Lynn Whittington was alone in the juvenile quarters of the Fairfield County Jail at any time, it was because there were no other juveniles to be confined at that particular time and not because he was to be kept by himself.

The Court of Appeals of Fairfield County, Ohio, found, on actual view, that the petitioner was: "confined in a portion of the jail used for adults and that an adult is in fact now confined in an adjoining cell, in the same room." (A. 253) This was found to be in violation of Section 2151.34 of the Ohio Revised Code. (A. 253) This is further proof that the statutes of the Juvenile Code of the State of Ohio were enacted for the protection of juveniles.

2-D. THE BURDEN OF PROOF REQUIRED FOR THE COURT TO FIND BUDDY LYNN WHITTINGTON TO BE A DELINQUENT CHILD.

There are several Ohio appellate decisions which have held that the degree of proof necessary to find a juvenile guilty of being a delinquent child is "a preponderance of the evidence." *State vs. Shardell,* 8 OO 2nd 262, *In re L————————, Jr.,* 25 OO 2nd 369.

There is no reason, or way to distinguish this case from the Shardell case because in both of these cases the juvenile, while alleged to have committed a serious offense, was only charged with being a "delinquent child." It is not a question of being more or less delinquent, or more serious, or less serious, as the actual charge in the Shardell case and in the instant case were identical.

It is also alleged by the defendant-appellant that the Judge found only that there was "probable cause to believe" the defendant may have done an act which, if done by an adult, would be a felony.

It is well established in Ohio that a judge speaks as the Court only through the Journal of the Court. See *14 Ohio Jur. 2nd., Courts, Section 3,* at page 431.

State ex rel. Ruth v. Hoffman, 37 O.O. 568 provides in part as follows:

> "1. A judge speaks as the Court only through the Court's Journal.
> 2. Neither the oral announcement nor a written memorandum of intention is binding upon the judge, as an act of the Court."

In *Andrews v. Board of Liquor Control,* 164 O.S. 275, the Supreme Court held in part as follows:

> "3. It is an invariable rule that a Court speaks only through its Journal, and where its opinion and its Journal are in conflict the latter controls and the former must be disregarded."

The Entry of the Juvenile Court of Fairfield County, Ohio, on this matter contains the following language:

> "* * * finds that said Buddy Lynn Whittington is a minor under the age of 18 years, 14 years of age, and is a delinquent child as set forth in the complaint, and that said Buddy Lynn Whittington has committed an act which would be a felony if committed by an adult." (A. 54)

For these same reasons, it is clear that if the Court speaks only through its Journal, then the motion of the defendant to dismiss at the conclusion of the State's evidence was properly overruled, as the Court's Entry does show that the defendant was found guilty of the charge of being a delinquent child. No mention of probable cause, proof by a preponderance of the evidence, or beyond a reasonable doubt is mentioned in the Entry.

It is also to be noted from the language of Judge Hastings at page 240 of the Record that he considered that ruling only of a preliminary or intermediate nature. The Judge said in part as follows:

> "And, at this time, it is the order of the Court that the boy be examined, physical and mental examination be made of such child, by the Bureau of Juvenile Research, which, I think, is now called the Diagnostic Center of the Youth Commission. And is Mr. Rutherford here? Would you call him please?
> (Mr. Rutherford summoned by bailiff)
> (Tr. 306) The Court: Mr. Rutherford, in furtherance of the finding of the Court which has just now ordered that a physical and medical examination be made by the Diagnostic Center of the Youth Commission, it is the further order of the Court that—the law requires, after full investigation, the Court ask you to make any further investigation that hasn't already been disclosed in here with regard to this young man and you'll report to the Court.
> Mr. Rutherford: Your Honor do I understand that he is to go to the Diagnostic Center?
> The Court: That's right." (A. 240)

This language of the Court further supports the contention of the State that the order of the Juvenile Court is not a final order and thus is not an appealable order.

In examining the burden of proof question we should first examine the actual complaint that may be filed against a juvenile in the Ohio Juvenile Court.

A juvenile can be said to be a "delinquent child," a "neglected child," a "dependent child" or "a juvenile

traffic offender" and in each case the juvenile judge has authority under Ohio Law to hear the complaint without the intervention of a jury.

Section *2151.35 of the Ohio Revised Code* provides in pertinent part as follows:

> "The juvenile court may conduct its hearings in an informal manner, ***. The juvenile court shall permit a child to be represented by an attorney at law during any hearing before such court ***. All cases involving children shall be heard separately and apart from the trial of cases against adults.*** The Court shall hear and determine all cases of children without a jury.*** If the Court finds that the child is a juvenile traffic offender or is delinquent, neglected or dependent, it may by order entered proceed as follows: [Here follows in a list paragraphs A through G the various actions the Judge may take]."

No mention is made as to the degree of proof necessary for the Juvenile Judge to find a child delinquent, neglected, dependent or a juvenile traffic offender and also no mention is made as to which of these is more or less serious (except for a male over 16 years of age who has committed an act which would be a felony if committed by an adult).

In each of these categories the Juvenile Judge has the authority to take the child from its home; to incarcerate the child; to commit the child to the Ohio Division of Social Administration of Public Welfare; to place the child on probation under various terms under various circumstances; to fine the child (if a juvenile traffic offender or a delinquent child); and to make such further disposition as the court deems proper.

To follow the suggestion of the defendant-appellant would require the court to clearly distinguish between the procedures that must be followed for children charged with being "delinquent," "neglected," "dependent," or "juvenile traffic offenders."

All children who have complaints filed against them in any of the above categories are subject now to the same

procedures, the same possible incarceration and practically the same possible dispositions. It would not be "fair" or "practical" to provide for bond in all of the above type cases or for strict procedural safeguards in each type. The question could be asked to whom would a "neglected" or "dependent" child be released on bond. What amount of bond would a parent who had abandoned his or her child have to provide in order to require the court to return his or her child to parental custody?

In all of these matters, the Ohio Appellate Courts have held the complaints filed in Juvenile Courts against youthful offenders are not criminal in nature, and this basically is because of the loco parentis background of our Juvenile Courts.

To rule that the Fourteenth Amendment to the United States Constitution requires the additional safeguard of the highest degree of proof known to our law before finding a juvenile to be a "delinquent child" would be another step toward treating each juvenile more like an adult, more like a criminal, than has ever been proposed to date.

Many authorities have been filed by the defendant-appellant to show the past and present trends of this court, as well as courts in other jurisdictions of the United States, in support of the contention that the burden of proof required in the Juvenile Court should be higher than by a "mere preponderance of the evidence." The Ohio cases on this point differ from these trends and have held since the matter in Juvenile Court is not criminal in nature that a mere preponderance of the evidence is all that is needed.

This court has held in *Kent vs. U.S.* that the important matter that will be examined by the court is whether or not due process has been met.

It appears from the Kent case, Re Gault case and this case, that we are not as much concerned as to whether petitioner has committed the act wherein he was found to

be a delinquent child by the Juvenile Court, as we are with whether or not all of the strict procedural requirements that make up due process, have been met.

If the Juvenile Courts are restricted and strangled by numerous unnecessary procedural requirements, they will fail in the work that they were established to do; the rehabilitation, discipline, treatment, care and assistance of delinquent, dependent, neglected and crippled children. If the Juvenile Court is prohibited from doing this task, who will be able to assume this responsibility and accomplish this task? Certainly, the adult criminal courts cannot do so, and if they did, the juvenile would be the loser. Someone, preferably the Juvenile Court, with its long past experience, must be able to step in and assist the juvenile when parents fail them.

3. THE STATEMENTS MADE BY PETITIONER AND ADMITTED INTO EVIDENCE BY THE JUVENILE COURT DO NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW TO THE PETITIONER

Mr. Phillips, Chief of Police of the Village of Baltimore Ohio, testified that he was recalled to the scene of the Whittington home where the body of Mrs. Willard was found at approximately 8:20 P.M., and that he questioned the members of the Willard family and the Whittington family that evening. The following is a transcript of part of the testimony of Mr. Phillips showing the conversation he had with the petitioner that evening, in the Whittington home. (A. 207 - 209)

"Mr. Phillips: I asked Buddy if he were there all morning, and he said "Yes." And I asked him if he was alone, and he said, "Yes." I asked him if he had seen Mrs. Willard, and Buddy stated yes, she had come to the door about eight o'clock, returned the curlers and left, but he did not know where she went.

Mr. Morehart: By the way, did you see these curlers?

A. Yes, I saw the curlers.

Q. Where were they at the time you saw them? A. They were in the kitchen. * * *

Q. Did you have any further conversation with Buddy Whittington at that time? A. Yes. I asked Buddy if he were there all day, and he said he'd been out part of the day hunting Mrs. Willard; and, in fact, he said all day, about all day he had been hunting Mrs. Willard. And I made the statement that we were not called—she was not officially reported missing until three o'clock. Buddy stated he was out long before that and mentioned 11:30.

Q. You mean, mentioned 11:30? A. Mentioned that he had been hunting her.

Q. Since 11:30? A. Since about 11:30.

Q. All right. A. At the time, I believe, Mrs. Whittington stated she couldn't understand. Buddy had been—had never been left alone more than one hour at a time until that particular day. Of course, she told us that Buddy was supposed to have gone to school that morning, and he didn't go to school, he stated, because he was sick. And he helped hunt then, and he helped me in the afternoon, I'd say approximately four o'clock, when I ran into the boys.

Q. Did you ascertain what time the Whittingtons had left that morning? A. From my understanding, it was approximately 7:30.

Q. Who did you get this from? Where did you learn this? A. I learned it there that day. I'm not going to say any particular person because I don't know. Buddy stated they had left that morning early.

Q. Did he say what he did after they left? A. Why, Buddy stated he went in and lay down on the bed after they left and turned on his record player.

Q. And he told you that he did not go to school because he was ill? A. Because he was ill.

Q. Do you know what time he was supposed to go to school? A. He was to be in class at 8:30.

Q. At 8:30. Did you learn from him what time he would usually, normally leave to go to school? A. No, I didn't ask him what time he would leave to get there.

Q. How far is this from the schoolhouse? A. About two blocks.

Q. It's close? A. It's close, real close.

Q. What if anything further did you do in regard to this investigation? A. I think about that time, you and Mr. Rutherford were there. Of course, I continued my investigation as to trying to find out the details and so forth. But I'm pretty sure that that's about all the questioning, outside of when I came out of the bedroom, Mr. Whittington was standing in the little hallway next to the bedroom. But I've known him for years and years and always called him Bud, and I asked Bud if he knew what might have happened, and Bud stated, "I don't know, unless this boy." Buddy was standing right beside him.

Mr. Supman: "Unless this boy"?

A. That's right. * * *"

Mr. Rutherford, Juvenile Probation Officer, who was called to the Whittington home on the evening of July 29, 1966, the same evening the body was discovered, testified as to his conversation with Buddy Lynn Whittington and his mother and father as follows: (A. 217 - 219).

"Mr. Morehart: All right. After you investigated the bedroom and you had talked to the officials present, what then did you do.

Mr. Rutherford: I talked with Buddy and his parents.

Q. Where did this take place? A. This took place in the dining room, I would call it, of the Whittington home.

Q. Who was present at the time? A. Mr. and Mrs. Orville Whittington and their son, Buddy; Mr. Morehart,

the Prosecuting Attorney; the Chief of Police, Mr. Phillips of Baltimore; Mr. Berry, the Deputy Sheriff; and this other gentleman. I don't recall his name.

Q. Do you recall what the conversation was? A. Yes. The conversation was started out as to where the Whittingtons had been that day, and the conversation was with Mr. Whittington and Mrs. Whittington and the boy. I don't recall whether it was Mr. Whittington or Mrs. Whittington, I believe it was Mr. Whittington, told me that they had gone to Canton to visit some friends or relatives that day and had left in the morning around 7:30 and had returned in the evening around the supper hour, sometime—I don't recall exactly what time they returned home, whether they told me or not. In talking with Buddy, he told me he got up that morning and dressed, and was going to go to school; but that after his parents left, he felt ill and he didn't go to school. And I was informed at that time that he attended a summer class at the Liberty Union School, or the Liberty Union High School, taking a course in mathematics, and he didn't go to school because he felt ill.

Q. Did he tell you the nature of his illness? A. He said he had a stomach-ache.

Q. Any other conversation? A. Yes. I asked him if he'd seen Mrs. Willard that day, and he told me that he had. That sometime about eight o'clock, she come to the door to return some curlers that his mother had loaned her, or used in fixing Mrs. Willard's hair.

Q. Did he say what door she came to? A. Said she came to the rear door, and he said he didn't recall just exactly what she said, but she said something like, "You-Who, anybody home?" Something like that. He just didn't recall exactly what it was, but he got up and went to the door. She handed him the curlers and he laid them there on the chair, I believe, or the table. I believe, it was the chair. And

she turned and walked away. He said he didn't know which way she went, that he went back and lay down on the bed.

Q. Did you have any further conversation with him? A. Yes, I asked Buddy if he had any idea of how Mrs. Willard's body had got under the bed, and he said he didn't know anything about it. I asked him if he had seen anybody else around the neighborhood that day, if there had been anybody come to the door, if there was anybody in the house; he said he hadn't seen anybody. I asked him if he'd left the house in the morning, and he said he'd left some time close to noon. He didn't know exactly what time it was. He thought it was sometime right after eleven o'clock, but he wasn't sure. He said he left after a lady came who was a sister of Mrs. Willard and told him that Mrs. Willard was missing. Then, I think, he said he changed his clothes and went to the berry patch to look for Mrs. Willard.

Q. Did he tell you how long he waited there after the woman came to the door before he left? A. It was some period of time. I don't recall exactly, but it runs in my mind, thirty, forty minutes, something like that. I don't recall. I recall him saying it wasn't right away. He didn't get up and go right away, but he waited and changed clothes and it was a little period of time before he left. But not too awful long. It wasn't immediately. He told me, but I just don't recall exactly. But I think he said thirty, forty minutes, something like that.

Q. That's after the woman had been there inquiring? A. After the lady come and told him. I asked him—he told me he'd gone to look for her, and I asked him how he knew she was missing. And he said this lady had come and told him, asked if she was at the house and asked him if he knew anything about her, that she'd been missing. They couldn't find her. He then said that he went to look for her, and in the afternoon after he'd looked for her, looked

in the berry patch, then he came back and went to baseball practice. * * *."

The questions asked by Mr. Phillips and Mr. Rutherford were all asked as a part of the general on-the-scene questioning with several persons present including the defendant, his father and his mother. The scene was the home of Buddy Lynn Whittington and his parents. The time was within hours of the disappearance of the decedent and the discovery of the body in the Whittington home, in Buddy Lynn Whittington's bedroom.

At the time that Buddy Lynn Whittington was questioned in his home in the presence of his mother and father, Buddy Lynn Whittington was not in custody of the police; he had not been arrested, and the investigation could certainly have been said at that time to be in an initial stage. The investigation at that point had not been narrowed to a point where Buddy Lynn Whittington was a definite suspect but because the defendant was a juvenile, the local authorities had contacted Mr. Rutherford to be there and to take part in the investigation in the eventuality that a juvenile was implicated in any manner. It is good to note at this point that the crime occurred on July 29, 1966, and that while the investigation began that same date, the complaint was not filed and the defendant was not arrested until August 5, 1966.

In *Miranda vs. State of Arizona,* 384 US 436, this Court held that:

> "'Custodial interrogation,' within the rule limiting the admissibility of statements stemming from such interrogation, means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action if any significant way.
>
> * * * * * * *
>
> Rules relating to warnings and waiver in connection with statements taken in police interrogation do not

govern general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process."

In its opinion in the same case, the Court said at page 444 and 445 that:

"By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

* * * * * * *

"The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney *in a room in which he was cut off from the outside world.* In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—*incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.*" (Emphasis added)

At page 477 and 478, the Court also said:

"Our decision is not intended to hamper the traditional function of police officers in investigating crime. See *Escobedo v Illinois,* 378 US 478, 492. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere

inherent in the process of in-custody interrogation is not necessarily present."

The Court cited the following in its footnote to the above:

> "In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavorable to the suspect.' *Chalmers v H.M. Advocate,* (1954) Sess Cas 66, 78 (J.C.)."

The defendant-appellant, in his brief, goes on at length about the many pitfalls that could arise when a juvenile is interrogated or questioned by authorities under various circumstances; but the important issue is what are the facts of this case, not what they might be.

In *Re Gault* the Court said at page 538 that:

> "We consider only the problems presented to us by this case."

We ask the Court to continue that policy and consider only the problems raised by the facts in the instant case.

The facts show that what questioning of the defendant took place did so in his home. The defendant was not in custody, and his father and mother, as well as a neighbor or another relative, were present. The questioning was not prolonged and was not any more than of the: Where were you? What did you see? Did you see anyone else around? When did you last see Mrs. Willard? type of inquiry.

The father was questioned along the same vein, as was the mother of the defendant, and the husband and son of the decedent.

As for the claim of the defendant-appellant that he has repeatedly denied knowledge of the crime, we can only pre-

sume this answer from his not guilty plea. The defendant, Buddy Lynn Whittington, has never testified at any hearings; and only his father and attorneys have denied any knowledge of the incident for him.

The rules set forth in Miranda have not, prior to this time, been applied to juvenile cases. If we are to presume that the original concepts laid down for juvenile courts are correct; and if we are to follow these original precepts and place the court in a fatherly position to the defendant, then naturally the rigid provisions set forth in Miranda should not apply in juvenile proceedings.

The juvenile or minor defendant under eighteen in an Ohio juvenile court is not charged with a crime but is merely a "delinquent child" if found guilty of the charge against him. (Section 2151.35 of the Ohio Revised Code).

We realize that under the language contained in *Re Gault*, this distinction between "criminal" and "delinquent child" is not universally appreciated, but in fact it is an important consideration to the person concerned.

A young man or woman of eighteen or over who was a "delinquent child" and who may have been actually guilty of an act or several acts which would have been felonies, if he or she were over eighteen at the time, can truthfully say on a job application, military service application or college application that he or she has never been convicted of a felony. This distinction is quite valid to the person who might otherwise be refused admission to a college of his or her choice or be denied a job because of a felony record.

Section 2151.35 of the Revised Code of Ohio provides in pertinent part as follows:

> "The judgment rendered by the court under this section shall not impose any of the civil disabilities ordinarily imposed by conviction, in that the child is not a

criminal by reason of such adjudication, nor shall any child be charged or convicted of a crime in any court, except as provided in section 2151.26 of the Revised Code. The disposition of a child under the judgment rendered or any evidence given in the court shall not be admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of such child may be considered by any court only as to the matter of sentence or to the granting of probation. Such disposition or evidence shall not operate to disqualify a child in any future civil service examination, appointment, or application."

While we believe that there is great justification for permitting the juvenile courts to operate outside the strict procedural rules of the Miranda case, we are here basically concerned with the facts and circumstances of the instant case and to extend the application of Miranda to all juveniles would be a great departure from the past, but even then would not affect the outcome of this case.

In this case, there was absolutely no custodial interrogation of Buddy Lynn Whitttington. There was no locking away of the defendant until he confessed. There was no taking him away from his friends or relatives and asking him questions for hours. There was no "Mutt and Jeff" interrogation. There was no bleak jailroom in unfamiliar, strange or frightening surroundings.

To rule that the few questions asked of Buddy Lynn Whittington, and the few responses he made to police authorities, were improperly admitted and should be excluded from testimony in any hearing in juvenile court, would require a rule of law that would prevent any questioning at the scene or anywhere else without giving the full Miranda warning. If you questioned anyone who turned out to be an accused—even at the scene—the answer would thus later be inadmissible if the full warning had not been given.

CONCLUSION

The order appealed from in this case is not a final order, the appeal is premature and should therefore be dismissed.

If this Court decides that the order appealed from is a final order, we submit that children are not adults, are not mature and that their problems require treatment different from that afforded adults. Informality in procedure and flexibility of disposition are essential to the concept of individualized justice. Every child has a different and distinct personality all his own and parents must be able to learn how to treat each child, depending on the distinct personality traits and habits of said child. The Juvenile Court must have the informality in procedure and flexibility of disposition if it is to effectively treat each juvenile as an individual and a blanket application of constitutional guarantees designed to protect adult defendants in criminal cases would vitiate our juvenile court laws, and would not serve the best interests of the juvenile.

For these reasons, it is respectfully submitted that the petitioner was not denied due process of law and the appeal should be dismissed.

Respectfully submitted,

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